

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID AND PNINA ROSENSTARK	:	DETERMINATION
		DTA NO. 816444
for Redetermination of a Deficiency or for Refund of New	:	
York State and New York City Personal Income Tax under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1992 and 1993.	:	

Petitioners, David and Pnina Rosenstark, 499 Locust Terrace, West Hempstead, New York 11552-3019, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1992 and 1993.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated August 4, 1998 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners did not respond to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination commenced on September 3, 1998, the date petitioners' time to serve a response to the Division's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners' request for a conciliation conference was properly denied as untimely filed.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioners, David and Pnina Rosenstark, a Notice of Deficiency dated June 11, 1996 and addressed to petitioners at "499 Locust Ter W Hempstead, NY 11552-3019." The notice bears assessment identification number L-011851006-6 and certified mail control number P 911 173 663. The notice asserts a total amount due of \$1,252.69. The computation summary section of the notice indicates that this amount was comprised of \$948.00 in New York State and City income tax due, plus interest and penalty, for the year ended December 31, 1993.

2. Petitioners filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") in protest of the 1993 income tax deficiency. Petitioners' request is dated December 24, 1997 and was mailed to BCMS on December 26, 1997.

3. BCMS issued a Conciliation Order Dismissing Request to petitioners dated February 6, 1998. It states, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on June 11, 1996, but the request was not mailed until December 26, 1997, or in excess of 90 days, the request is late filed.

4. Notices of Deficiency, such as the one at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record

(“CMR”). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading “Certified No.” The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page 1 of the CMR lists an initial date of June 1, 1996, which has been manually changed to June 11, 1996.

6. After a notice of deficiency is placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

7. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

8. The CMR relevant to this case is a 134-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Presort Qualified Mail." This CMR lists consecutive certified control numbers P 911 172 405 through P 911 173 872, inclusive. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 134 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

9. Information regarding the subject Notice of Deficiency is contained on page 115 of the CMR. Specifically, corresponding to certified control number P 911 173 663 is notice number L 011851006, along with the name of petitioner David Rosenstark and an address, which is identical to that listed on the subject Notice of Deficiency. The CMR lists only the name of petitioner David Rosenstark because it is the standard procedure for the CMR to list only the name of the primary taxpayer associated with the statutory notice.

10. The notice numbers, names and addresses of taxpayers other than petitioners have been redacted from the CMR in order to comply with statutory privacy requirements.

11. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated June 11, 1996.

12. The last page of the CMR, page 134, contains a pre-printed entry of 1,468 under the heading "total pieces listed." In addition, this pre-printed entry has been manually circled and

beneath it is the signature of a Postal Service employee. Page 2 of the CMR also contains the signature of the same Postal Service employee.

13. Appearing immediately beneath the “total pieces” listing on page 134 is the listing “Total Pieces Received at Post Office.” No information appears after this listing.

14. The affixation of the Postal Service postmark, the signature of the Postal Service employee, and the circling of the “total pieces listed” figure indicate that all 1,468 pieces listed on the CMR were received at the post office.

15. The Division generally does not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact “4” through “12”, “14” and “15” were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties include supervising the processing of notices of deficiency such as the one at issue herein. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

17. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received (*see*, Finding of Fact “14”) was established through the affidavit of Mr. Baisley. Mr. Baisley’s knowledge of this fact is based on his knowledge that the Division’s Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

18. The address on the subject Notice of Deficiency is the same as the address given on petitioners' filed 1993 Resident Income Tax Return (Form IT-201), which was signed by petitioners and dated April 11, 1994. It is also the same as the address listed on a power of attorney form dated June 25, 1996, which was signed by petitioners, and petitioners' request for conciliation conference dated December 24, 1997.¹

19. The Division conducted a search of its personal income tax files for the personal income tax returns of petitioners for the years 1994 and 1995. No such personal income tax returns were found.

20. With respect to the year 1992, the record contains a Consolidated Statement of Tax Liabilities dated February 12, 1998 and bearing the name of petitioner David Rosenstark. The consolidated statement indicates a personal income tax liability for the year 1992 of \$291.00 in tax assessed, plus interest and penalty. The assessment identification number for this liability is listed as L-011669589-1. The record also contains an executed Bureau of Conciliation and Mediation Services Consent indicating acceptance by petitioners of a final disposition of the 1992 income tax liability referred to in the consolidated statement. The executed consent also states: "I hereby agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the above notice."

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is

¹The record also contains a copy of a 1993 nonresident income tax return (Form IT-203) which lists a Connecticut address for petitioners. This return is not signed by petitioners. It bears a stamp indicating receipt by the Division of Taxation on May 12, 1998.

presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioners did not respond to the Division's motion; they are therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioners presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and pursuant to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." In this case, the record is clear that the address listed on the subject Notice of Deficiency was petitioners' last known address (*see*, Findings of Fact "18" and "19"). A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]).

D. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or

offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency (*see*, Finding of Fact “16”).

F. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the notice of deficiency for the 1993 tax year was mailed to petitioners on June 11, 1996. Specifically, this 134-page document lists sequentially numbered certified control numbers with corresponding names and addresses. No entries on this document have been deleted. All 134 pages of the CMR bear a U.S. Postal Service postmark dated June 11, 1996. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee circled the total pieces listed figure on page 134 to indicate receipt by the post office of all pieces of mail listed thereon (*cf., Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the Notice of Deficiency for the 1993 tax year on June 11, 1996. Petitioners’ request for a conciliation

conference, mailed on December 26, 1997, was therefore untimely filed (*see*, Tax Law § 170[3- a][a]).

G. Regarding the 1992 tax year, the language of the consent clearly precludes any petition to the Division of Tax Appeals concerning this assessment (*see*, Finding of Fact “20”).

H. The petition of David and Pnina Rosenstark is dismissed.

DATED: Troy, New York
October 8, 1998

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE